

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3 August Term, 2004

4 (Argued: June 22, 2005)

Decided: June 1, 2006)

5 Docket No. 04-3886-pr

6 JOSEPH HAYDEN, on behalf of himself and all individuals similarly situated; LUMUMBA AKINWOLE-
7 BANDELLE, WILSON ANDINO, GINA ARIAS, WANDA BEST-DEVEAUX, CARLOS BRISTOL,
8 AUGUSTINE CARMONA, DAVID GALARZA, KIMALEE GARNER, MARK GRAHAM, KERAN HOLMES,
9 III, CHAUJUANTHEYIA LOCHARD, STEVEN MANGUAL, JAMEL MASSEY, STEPHEN RAMON, NILDA
10 RIVERA, LILLIAN M. RIVERA, MARIO ROMERO, JESSICA SANCLEMENTE, PAUL SATTERFIELD and
11 BARBARA SCOTT, on behalf of themselves and all individuals similarly situated,

12 *Plaintiffs-Appellants,*

13 v.
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15 GEORGE PATAKI, Governor of the State of New York; CAROL BERMAN, Chairperson, New York
16 Board of Elections; GLENN S. GOORD, Commissioner of New York State Department of
17 Correctional Services,
18

19 *Defendants-Appellees.*
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21 Before: WALKER, *Chief Judge*, JACOBS, CALABRESI, CABRANES, STRAUB, POOLER, SACK,
22 SOTOMAYOR, KATZMANN, PARKER, RAGGI, WESLEY, and HALL, *Circuit Judges*.
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24 JANAI S. NELSON (Theodore M. Shaw, Norman J. Chachkin,
25 Ryan P. Haygood, Alaina C. Beverly, NAACP Legal
26 Defense & Educational Fund, Inc., Juan Cartagena,
27 Risa Kaufman, Community Service Society of New
28 York, Joan P. Gibbs, Esmeralda Simmons, Center for
29 Law and Social Justice at Medgar Evers College, *of*
30 *counsel*), NAACP Legal Defense & Educational Fund,
31 Inc., New York, NY, *for Hayden Plaintiffs-Appellants*.
32

33 MICHELLE M. ARONOWITZ, Deputy Solicitor General (Caitlin
34 J. Halligan, Solicitor General, Julie Sheridan, Gregory
35 Klass, Benjamin Gutman, Richard Dearing, Assistant
36 Solicitors General, *of counsel*, Eliot Spitzer, Attorney
37 General of the State of New York, *on the brief*), New
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1 York, NY, *for Defendants-Appellees*.

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3 JESSIE ALLEN (Deborah Goldberg, Brennan Center for
4 Justice at New York University School of Law, Julius
5 L. Chambers, Anita Earls, University of North
6 Carolina School of Law Center for Civil Rights, *of*
7 *counsel*), Brennan Center for Justice at New York
8 University School of Law, New York, NY, *for amici*
9 *curiae* Brennan Center for Justice and the University of North
10 Carolina School of Law Center for Civil Rights in support
11 of Plaintiffs-Appellants.
12

13 DAVID B. SALMONS (Sheldon T. Bradshaw, Principal Deputy
14 Assistant Attorney General, and Cynthia M.
15 McKnight, David K. Flynn, and David White,
16 Attorneys, *of counsel*, R. Alexander Acosta, Assistant
17 Attorney General, *on the brief*), Department of Justice,
18 Civil Rights Division, Appellate Section, Washington,
19 DC, *for amicus curiae* United States of America in support
20 of Defendants-Appellees.
21

22 Peter T. Barbur, Cravath, Swaine & Moore, LLP, New York,
23 NY, *for amicus curiae* Association of the Bar of the City of
24 New York in support of Plaintiffs-Appellants.
25

26 Robert Bloom (Matthew Strugar, *of counsel*), Center for
27 Constitutional Rights, New York, NY, *for amici curiae*
28 *Center for Constitutional Rights, National Alliance of*
29 *Formerly Incarcerated Persons, Osborne Association, Coalition*
30 *for Parole Restoration, Voice of the Ex-Offender, Eleventh*
31 *Episcopal District Lay Organization, Ordinary People*
32 *Society, Center for Law and Justice, and Malcolm X Center* in
33 support of Plaintiffs-Appellants.
34

35 Michael L. Foreman (Jon M. Greenbaum, Marcia F. Johnson-
36 Blanco, Jonah H. Goldman, Lawyers' Committee for
37 Civil Rights Under Law, Elliot M. Minberg, Alma C.
38 Henderson, People for the American Way
39 Foundation, Angela Ciccolo, Interim General
40 Counsel, Victor L. Goode, Assistant General
41 Counsel, National Association for the Advancement
42 of Colored People, Grasford W. Smith, Jr., National
43 Black Law Student Association Northeast Region, *of*
44 *counsel*), Lawyers' Committee for Civil Rights Under
45 Law, Washington, DC, *for amici curiae* Lawyers'

Committee for Civil Rights Under Law, People for the American Way Foundation, National Association for the Advancement of Colored People, and National Black Law Students Association Northeast Region, in support of Plaintiffs-Appellants.

Lawrence S. Lustberg, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., New York, NY, *for amici curiae Zachary W. Carter, Veronica Coleman-Davis, Scott Lassar, Leonard Marks, Paul Schechtman, National Black Police Association, National Latino Officers Association of America, and 100 Blacks in Law Enforcement Who Care* in support of Plaintiffs-Appellants.

Johanna Schmitt (Jonathan D. Hacker, Derek R.B. Douglas, Charles E. Borden, Scott M. Hammack, Danielle M. Estrada, *of counsel*), O'Melveny & Myers LLP, New York, NY, *for amici curiae* Center for Community Alternatives, National Association of Criminal Defense Lawyers, New York Association for Criminal Defense Lawyers, and the Sentencing Project in support of Plaintiffs-Appellants.

Steven R. Shapiro (Arthur N. Eisenberg, New York Civil Liberties Union Foundation, Laughlin McDonald, ACLU Voting Rights Project, *of counsel*), American Civil Liberties Union Foundation, New York, NY, *for amici curiae American Civil Liberties Union and New York Civil Liberties Union* in support of Plaintiffs-Appellants.

Derek S. Tarson, Debevoise & Plimpton LLP, New York,
NY, *for amici curiae certain criminologists* in support of
Plaintiffs-Appellants.

Brenda Wright (Lisa J. Danetz, *of counsel*), National Voting Rights Institute, Boston, MA, *for amicus curiae National Voting Rights Institute and Prison Policy Initiative* in support of Plaintiffs-Appellants.

George T. Conway III (Kenneth K. Lee, Wachtell, Lipton, Rosen & Katz, Kent S. Scheidegger, Criminal Justice Legal Foundation, Roger Clegg, Center for Equal Opportunity, *of counsel*), Wachtell, Lipton, Rosen & Katz, New York, NY, *for amici curiae* Diane Piagentini, Mary Piagentini, Deborah Piagentini, *The Criminal Justice*

Legal Foundation, and the Center for Equal Opportunity in support of Defendants-Appellees.

Charles J. Cooper (Greg Abbott, Attorney General of Texas, Barry R. McBee, First Assistant Attorney General, Edward D. Burbach, Deputy Attorney General, Litigation, R. Ted Cruz, Solicitor General, Matthew F. Stowe, Deputy Solicitor General, State of Texas, David H. Thompson, Cooper & Kirk, PLLC, *of counsel*), Cooper & Kirk, PLLC, Washington, DC, *for amici curiae States of Texas, Alabama, Arkansas, Colorado, Delaware, Idaho, Michigan, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Utah, Virginia, and Washington* in support of Defendants-Appellees.

Mitchell S. Garber (Gregory M. Longworth, *of counsel*), Worth, Longworth & London, LLP, New York, NY, *for amicus curiae Patrolmen's Benevolent Association of the City of New York* in support of Defendants-Appellees.

PER CURIAM:

We write *nostra sponte* to clarify further proceedings contemplated by the mandate of the *en banc* Court in this matter. See *Hayden v. Pataki*, ___ F.3d ___, 2006 WL 1169674 (2d Cir. May 4, 2006).

Plaintiffs-appellants filed a class action complaint pursuant to 42 U.S.C. § 1983 that sought to invalidate the felon disenfranchisement provisions found in New York Constitution Article II, § 3 and New York Election Law § 5-106. Plaintiffs-appellants claimed that these provisions violated their rights under the First, Fourteenth, and Fifteenth Amendments, Section 2 of the Voting Rights Act of 1965 (codified at 42 U.S.C. § 1973), the Civil Rights Acts of 1957 and 1960 (codified at 42 U.S.C. §§ 1971(a)(1), 1971(a)(2)(A) & 1971(a)(2)(B)), and certain treaties and customary international law. On June 14, 2004, the District Court issued a memorandum and order granting defendants-appellees' motion for judgment on the pleadings and dismissing all of plaintiffs-appellants' claims.

1 *See Hayden v. Pataki*, No. 00 Civ. 8586 (LMM), 2004 WL 1335921 (S.D.N.Y. June 14, 2004). On
2 June 16, 2004, the District Court entered judgment on behalf of defendants-appellees.

3 On July 13, 2004, plaintiffs-appellants filed a timely Notice of Appeal in the District Court, a
4 copy of which was received and docketed by the Court of Appeals on July 23, 2004. The parties
5 then submitted briefs according to the following schedule: on September 27, 2004, plaintiffs-
6 appellants filed an opening brief, on November 24, 2004, defendants-appellees filed a response
7 brief; and on December 8, 2004, plaintiffs-appellants filed a reply brief. However, at the instruction
8 of Chief Judge Walker on February 17, 2005, this case was held in abeyance and not assigned to a
9 three-judge panel, pending a determination by the Court whether to consolidate the case with
10 *Muntaqim v. Coombe*, No. 01-7260, *see Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004), in which an *en*
11 *banc* proceeding was then pending.

12 By order of the *en banc* Court on February 24, 2005, this case was then consolidated with
13 *Muntaqim*, and accepted for appeal directly to the *en banc* Court for consideration of the single
14 “common issue of law” presented in both *Muntaqim* and *Hayden*—namely, “whether, on the
15 pleadings, a claim that a New York State statute, Section 5-106 of the New York Election Law, that
16 disenfranchises currently imprisoned felons and parolees results in unlawful vote denial and/or vote
17 dilution can state a claim for violation of Section 2 of the Voting Rights Act.” Order of Feb. 24,
18 2005.

19 The *en banc* Court deconsolidated *Muntaqim* by order of May 4, 2006, and entered a
20 judgment of dismissal of *Muntaqim*’s claims for want of standing. *See Muntaqim v. Coombe*, ___ F.3d
21 ___, 2006 U.S. App. LEXIS 11167 (2d Cir. May 4, 2006) (*per curiam*). Then, in this case, the *en banc*
22 Court proceeded to answer the question noted above in the negative, in an opinion filed May 4,
23 2006. *See Hayden v. Pataki*, ___ F.3d ___, 2006 WL 1169674 (2d Cir. May 4, 2006). The *en banc*

1 Court expressly did not consider, much less decide, whether plaintiffs-appellants had also stated a
2 claim on behalf of plaintiffs who are neither incarcerated nor on parole that their votes are “diluted”
3 because of New York’s apportionment process, “which counts incarcerated prisoners as residents of
4 the communities in which they are incarcerated, and has the alleged effect of increasing upstate New
5 York regions’ populations at the expense of New York City’s.” *Id.* at *15; *see also id.* at *45 n.9 (B.D.
6 Parker, *J.*, dissenting) (indicating that “the *Hayden* plaintiffs deserve the opportunity to fully brief and
7 undertake to prove their additional claim that New York’s apportionment process—which counts
8 incarcerated felons as residents of the communities in which they are incarcerated—results in
9 dilution of minority votes in violation of the VRA”). The *en banc* Court remanded *Hayden* to the
10 District Court to consider, in the first instance, “whether plaintiffs have indeed properly raised the
11 claim, and, if so, to rule on the merits of the claim.” *Id.* at *15. In doing so, we stressed that
12 because the apportionment issue “was neither considered by the District Court nor briefed by
13 defendants, we intimate no view on the question.” *Id.*

14 In order to enhance the orderly and efficient administration of justice, we continue to
15 believe that the proper course of action is for the District Court to address this possible vote
16 dilution claim *before* a regular three-judge panel considers the other federal constitutional, statutory,
17 and international law arguments raised by plaintiffs-appellants in their original appeal from the
18 District Court’s ruling (which were not addressed in the *en banc* Court’s ruling on plaintiff-appellants’
19 VRA claim). By proceeding in this manner, we hope to avoid multiple appeals in the future.

20 Thus, to clarify, the Clerk of Court is directed to issue the mandate for this case forthwith
21 and remand this case to the District Court for the limited purpose of considering whether plaintiffs-
22 appellants properly stated a vote dilution claim based on New York’s apportionment process, and, if
23 so, to rule on the merits of that claim. However, the Court of Appeals will retain jurisdiction over

1 the remaining claims raised by plaintiffs-appellants in their original briefs on appeal, which will
2 continue to be held in abeyance until after the District Court addresses this vote dilution issue on
3 remand. Any party seeking appellate review of the decision of the District Court on remand shall so
4 inform the Clerk of this Court within 30 days of that decision. Jurisdiction will then automatically
5 be restored to the Court of Appeals without the need for an additional notice of appeal, and in the
6 normal course the matter will be referred to a regular three-judge panel, to be heard along with the
7 remaining claims raised by plaintiffs-appellants in their original briefs on appeal. *Cf. United States v.*
8 *Jacobson*, 15 F.3d 19, 21-22 (2d Cir. 1994).